



STATE OF INDIANA

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November 14, 2012

Paul Goetz
1414 Chester Street
South Bend, Indiana 46615

Re: Formal Complaint 12-FC-332; Alleged Violation of the Access to Public Records Act by the Office of the Governor

Dear Mr. Goetz:

This advisory opinion is in response to your formal complaint alleging the Office of the Governor ("Governor's Office") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* J. Sebastian Smelko, Assistant General Counsel, responded in writing on behalf of the Governor's Office. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on June 6, 2012, you submitted a written request for records to the Governor's Office. You received a written response from Mr. Smelko on June 12, 2012, acknowledging the receipt of your request and advised that the Governor's Office was working to identify and gather any records that would be responsive to your request. The correspondence further provided that the Governor's Office would be in contact with you in a reasonable period of time.

On October 16, 2012 you made an inquiry regarding your request via certified mail. On October 25, 2012, Mr. Smelko contacted you and advised that he had received your October 16, 2012 correspondence and stated that his goal was to finalize the request and have all information to you by the end of next week. On November 7, 2012, you left a message with Mr. Smelko inquiring as to the status of your request. You believe that the Governor's Office is stalling and fear that all documents that are responsive to your requests will be destroyed or removed from the office shortly after Governor Daniels leaves office.

In response to your formal complaint, Mr. Smelko confirmed the timeline provided by you in your formal complaint. In addition, Mr. Smelko advised that he did receive your voicemail on November 7, 2012 but was unable to return your call that day as he was out of the office. Mr. Smelko returned your call upon his return to the office

and advised that all records would be produced to you the following week. Coincidentally, on the morning of November 13, 2012, copies of all records responsive to your request were mailed to you by Mr. Smelko.

Since the date of the receipt of your request, the Governor's office has processed approximately 30 public records requests and disclosed thousands of documents in response. In addition to the normal duties and functions of the office, staff must also comb through the documents that are maintained to ensure that the records are responsive to the request and are properly disclosable under the APRA. Contrary to your belief, Mr. Smelko advised that the Governor's office is not destroying documents nor is it purposefully stalling a release of any records. The Governor's Office fulfills requests as they are received and abides by all archival requirements of Indiana law.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *See* I.C. § 5-14-3-1. The Governor's Office is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Governor's Office during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Here, the Governor's Office responded in writing to your written request within seven days of its receipt. As such, it is my opinion that the Governor's Office complied with section 9(b) of the APRA in responding to your request.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying.

See I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

As applicable here, the Governor's Office received your request on June 6, 2012. Your request sought:

" . . . a copy of all documents and records created, received, retained, maintained, or filed by or with you or your office pertaining in any way to the Bilderberg Gathering in Chantilly, VA on or about May 31 – June 3, 2012, including, but not limited to:

- Invitation;
- Acceptance;
- Correspondence related to the event in any way, including phone records;
- Records pertaining to your panel discussion, including drafts and critiques;
- Travel Related Records;
- Financial Records;
- Post conference correspondence;
- Other records requests relating to the Bilderberg gathering; and
- Any other material within the meaning of I.C. § 5-14-3-2(n)."

On October 16, 2012, you submitted a written inquiry to the Governor's Office regarding your request. On October 25, 2012, Mr. Smelko attempted to contact you via telephone and ultimately left a message providing the status of your request. On November 7, 2012, you telephoned Mr. Smelko and left a message regarding the status of your request. Mr. Smelko has advised that he was not in the office that day, but returned your call upon his return and relayed to you that your records would be sent by early next week. On November 13, 2012, all records that were responsive to your request were mailed to you as provided by Mr. Smelko's previous call.

The disclosure consisted of approximately 135 pages, including email correspondence, written correspondence, invitations, reply forms, rosters, meeting notices, and travel advisory forms. In addition to responding to your request, Mr. Smelko advised that since the date of your request, the Governor's Office has responded to almost thirty public records requests and disclosed thousands of documents in response.

As such, in light of the broad array of documents that were produced in response to your request, Mr. Smelko's attentiveness to your inquiries, the number of other public records requests that the Governor's Office has produced or been working on since the date of your request, the requirement that the Governor's Office maintain its normal duties and responsibilities during the pendency of all records requests, the requirement that a public agency review all records prior to disclosure, and that all records have now been produced in response to your request, it is my opinion that the Governor's Office has complied with the requirements of section 3(b) of the APRA in response to your request.

CONCLUSION

For the foregoing reasons, it is my opinion that the Governor's Office has complied with the requirements of I.C. § 5-14-3-3(b) in providing records that were responsive to your request in a reasonable period of time.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: J. Sebastian Smelko